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INTRODUCTION

Arnold Fischman is to appear before this Court on February 13, 2017 for sentencing on the single count of possession of child pornography to which he has entered a guilty plea. We begin this sentencing memorandum with a recognition that Mr. Fischman's offense is a serious one, a deeply troubling departure from a life otherwise well-lived in service to others and to the community. Mr. Fischman is profoundly remorseful for this conduct. He is, however, an extraordinary individual as evidenced by the 46 letters from persons in all walks of life, which are attached as Exhibit A to this memorandum. Since a search warrant for computer evidence was served at his residence two years ago, Mr. Fischman has not only continued to work tirelessly to advance the positive conduct for which he is well-known, but has also compiled a strong record of post-offense rehabilitation, including intensive psychotherapy through which he has developed an understanding of his offense behavior and a firm resolve that it never be repeated. We respectfully ask the Court to view Mr. Fischman as a complete person and to take into consideration his strong personal qualities and history of service to those in need of affordable housing in determining the appropriate sentence in this case.

DISCUSSION

The letters submitted to the Court as Exhibit A and the Sentencing Video as Exhibit B present an unvarying picture of

1 Arnie Fischman as an enlightened, public-spirited advocate for the
2 poor and disadvantaged, a devoted family man who has nurtured his
3 son through the trauma of the untimely death of his mother, a
4 trusted and valued friend and a person of humility, generosity and
5 integrity. Drawing upon the heartfelt comments of those who wrote
6 these letters, we shall attempt to highlight those aspects of Mr.
7 Fischman's conduct through the years that demonstrate his great
8 value as a human being and which may assist this Court in its
9 sentencing decision.
10
11

12 **I. History and Characteristics of the Defendant**

13 **A. Lifelong Commitment to the Cause of Affordable Housing**

14 John Isbister, professor of economics at Ryerson University
15 in Toronto, has known Arnie Fischman for 45 years, since Arnie's
16 days as a graduate student at the University of California's Santa
17 Cruz campus where Professor Isbister was on the faculty.
18 Professor Isbister worked with Mr. Fischman on the board of a
19 community based credit union in Santa Cruz dedicated to improving
20 the lives of low and moderate income people in Santa Cruz County.
21 He early observed and came to admire "the skillful way in which
22 [Arnold] was able to translate his social values into actual
23 policies and make them work." Professor Isbister writes:
24
25

26 In 2007 I wrote a short memoire, not for publication but
27 just for family and friends. In it I included brief
28 portraits of my closest friends. About Arnie's work in
housing I wrote: "he became one of the leading low-
income housing developers in the area, the consequence
being that his accomplishments are visible in a way that

1 most of our accomplishments are not. Cooperative and
2 low-income housing projects in Santa Cruz and Monterey
3 counties, homes that make life possible for ordinary
4 folks in a region where private housing prices are
outrageous, are his legacy. Without him, they wouldn't
be there."

5 Ancel Romero, president of a non-profit affordable housing
6 organization serving over 2,000 low-income seniors in California
7 and Washington State, writes in the same vein, pointing out that
8 "over 400 low-income seniors would either be homeless or living in
9 sub-standard housing without his valued contributions. According
10 to Romero, Arnie's contributions have gone beyond the complex and
11 multi-faceted projects he has put together, volunteering
12 countless hours mentoring others in the affordable housing field.
13 These volunteer efforts included organizing industry-sponsored
14 workshops aimed at improving the technical skills of housing
15 developers nationwide. As Romero says "[d]ozens of housing
16 providers would not have reached their full potential if not for
17 the knowledge and inspiration that only someone like Arnie could
18 provide."
19
20
21

22 This work, as these letter writers attest, is extremely
23 complicated, requiring that funding sources be brought together
24 with builders, lawyers and regulators in a way that produces
25 affordable housing. Wendy Brown, a professor of political science
26 at University of California, Berkeley, has known Mr. Fischman
27 since 1977 when they met through common interests in community
28 organizing. Arnie introduced Professor Brown to the world of low-

1 income housing politics when she was just beginning to work in the
2 field. She writes:

3 Arnie's four decades of work in low income housing
4 development and cooperatives is a remarkable study in
5 taking an abstract principle - "every family ought to
6 have decent and secure shelter" - and turning it into
7 concrete reality. Arnie taught himself the legal,
8 financial, and governmental dimensions of low-income
9 housing development, and proceeded to work with
10 countless government agencies, neighborhood
11 organizations, charities and churches, planning and
12 zoning boards, and local politicians to develop
13 genuinely affordable and dignified housing for poor and
14 working class households. For over a decade, Arnie was
15 the executive director of the Community Housing
16 Corporation in Santa Cruz and, today, Santa Cruz boasts
17 far more affordable housing than it would have had CHC
18 not existed. Of particular note is the Neary Lagoon
19 Housing Corporation in Santa Cruz, a self-governing
20 community comprising nearly 100 low income apartments
21 which is a model for the industry.

22 Throughout this work Mr. Fischman has been particularly
23 sensitive to the needs of minority communities. Cindy Heavens,
24 Community Development Specialist with the City and County of San
25 Francisco's Mayor's office has known Mr. Fischman for 19 years,
26 beginning in 1996 when she was a participant in the Northern
27 California Non-profit Housing Association's ("NPH") minority
28 fellowship training program. Mr. Fischman was then a co-
29 coordinator of the program, teaching workshops and acting as a
30 mentor. Ms. Heavens writes:

31 Arnie's teaching and mentorship are directly related to
32 my current position. The NPH training program was key
33 to becoming a project manager in affordable housing
34 without a master's degree. . . . Arnie noticed that many
35 of the communities served by non-profit housing
36 associations provided housing to people of color,

1 however, many people in the decision-making positions
2 were not people of color. Arnie, with NPH, studied this
3 occurrence, analyzed the salaries of various positions,
4 and organized a training program that trained people of
5 color to become project managers, which later put them
6 in position to be key decision-makers in affordable
7 housing and community development agencies.

8 * * *

9 As the co-coordinator and trainer of the NPH training
10 program, Arnie was thoughtful, respectful and
11 encouraging, as people of color voiced concerns and
12 complaints to him about community development work
13 and/or the organizations we were training under. Arnie
14 never patronized us. He always acknowledged our
15 feelings and growing skills and respected that as people
16 of color we could, based on our life experience, notice
17 that some people may be interacting with us out of their
18 own preconceptions. Yet, he challenged whether some of
19 our observations or assumptions were based on actual
20 character or skill development and not from someone
21 perceiving us as an outsider. As a Caucasian, Arnie's
22 position and effectiveness required delicacy, self-
23 awareness, and knowledge of the historical and cultural
24 context of the training program participants. Arnie was
25 impressive and I found him more astute than some of my
26 former college professors.

27 Mike Rotkin, five-time former Mayor of Santa Cruz and former
28 director of a field study program at the University of California,
Santa Cruz, has had extensive experience working with Mr. Fischman
on a wide variety of educational and community projects over
several decades. He sounds the same theme as Ms. Heavens, writing
that "Arnie has been a tireless advocate for and producer of
affordable housing for low-income renters, and especially for low-
income renters of color, disabled individuals, the elderly, and
single parent families since the mid-1970s."

1 It is important to emphasize that Mr. Fischman did not
2 undertake this difficult and complicated work for financial
3 remuneration. Kate Comfort Harr, Executive Director of a non-
4 profit housing corporation in San Mateo, first notes that "as a
5 result of [Mr. Fischman's] efforts, hundreds of low-income people
6 now have a place to call home." She notes, however, that personal
7 financial gain from this kind of work is minimal: "you do the work
8 because you believe it is important and because it makes our
9 communities better places to live." Mr. Fischman has spent his
10 entire adult life and career making the dream of affordable
11 housing become a reality for countless people and he has done this
12 with unfailing kindness, generosity and compassionate, as well as
13 great skill.

14
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16 **B. Family and Community Responsibilities**

17
18 Throughout this productive if taxing career in affordable
19 housing, Mr. Fischman has fully committed himself to his son Max,
20 now 19 year old and a college student. All of the letter writers
21 to address the subject comment on Arnie's devotion to Max (see
22 letter of John Isbister). Wendy Brown, who has known Arnie since
23 1977, writes that Arnie "brought to parenting the same unqualified
24 love, commitment and attention to detail that he brought to his
25 work in housing development." She has observed Arnie as a "rare
26 and wonderful parent, one who could accept a child's fears and
27 weaknesses while helping him to become stronger." The sudden and
28

1 unexpected death of Max's mother and Arnie's partner, Tinka
2 Gordon, in January 2015, while undergoing treatment for breast
3 cancer, has obviously been traumatic for Max. But, as Professor
4 Brown writes, "[w]hile suffering from his own grief, Arnie has
5 also done an extraordinary job of shepharding Max through this loss
6 and helping him to pick up the pieces of his life." This reaction
7 is consistent with the support Mr. Fischman has always shown his
8 son and with his commitment to education in the community. As
9 Jane Korich, a long-time family friend, states, Arnie was "a
10 driving force in that community, helping in planning stages of the
11 renovation of a building to accommodate middle-school students" at
12 Park Day School. Kevin Knudtson, executive director of Community
13 Economics, Inc., whose children attended the school, recalls that
14 Arnie "was the longest serving member of the Board of Directors in
15 the school's history, and lead important efforts to acquire and
16 rehabilitate buildings the school now uses as its middle school."
17 Mr. Knudtson writes that Arnie's abilities "ranging from
18 affordable housing development to parent leadership at Park Day
19 School demonstrated that Arnie cared about these issues deeply."
20 Max himself has written a thoughtful letter to the Court
21 expressing his love and appreciation for his father.
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26 Throughout his life, Mr. Fischman has behaved toward other
27 people with respect, compassion and integrity. These qualities
28 shine through the many letters now submitted on his behalf. All

1 of these writers are aware of the present case and all of them
2 deplore child pornography and are aware of the harm it causes.
3 Nevertheless, they willingly wrote heartfelt letters of support
4 because they know what kind of person Arnie Fischman is and are
5 aware of the lives he has impacted in a positive way. The picture
6 that emerges is of a kind, thoughtful, generous and compassionate
7 man, who is esteemed by everyone who has known him through the
8 years. All agree that his offense is a serious one, but they are
9 gratified that he has addressed it by entering a course of intense
10 therapy; no one who knows Arnie Fischman believes that this
11 offense defines him as an individual because they are acutely
12 aware of his excellent character and contributions to the
13 community. This offense conduct is completely at odds with the
14 character he has always exhibited to them and inconsistent with
15 the entire course of his life, and thus aberrant.

16
17 Dr. Bryant Welch has been treating Mr. Fischman since January
18 2015, beginning just days after the search of Arnie's home by
19 federal law enforcement agents. Dr. Welch's letter, filed as
20 Exhibit C under seal, discusses in detail the course of Mr.
21 Fischman's treatment and the high degree of success that has been
22 achieved.

23 **C. Breast Cancer Over Time**

24 Since Tinka Gordon's death in January 2015, during treatment
25 of breast cancer, Mr. Fischman has become deeply involved in a

1 campaign to eradicate this terrible disease. Polly Marshall, one
2 of Mr. Fischman's oldest and closest friends, has described these
3 efforts in her letter to the Court. Ms. Marshall practiced law in
4 Oakland for 30 years before leaving her firm in 2015. She left
5 partly in response to a breast cancer diagnosis which was
6 followed, as she relates in her letter, by surgery, chemo therapy
7 and radiation treatments. She writes, "with Arnie's help,
8 knowledge, and special skill as a consultant, I formed a non-
9 profit corporation, Breast Cancer Over Time (BCOT), created and
10 controlled by women living with breast cancer whose mission is to
11 support research into breast cancer causation, to help prevent
12 breast cancer in our own daughters, and other young women in the
13 next generation." Ms. Marshall relates that without Arnie's help,
14 this new organization would not be possible:
15
16
17

18 The idea for this group was born immediately following,
19 indeed from, the ordeal and the injustice of the death
20 of Arnie's wife, Tinka. It was Arnie who brainstormed
21 with me on the mission, purpose, and structure of the
22 organization. It was Arnie who drafted the articles of
23 incorporation and bylaws, prepared out State and federal
24 income tax exemptions, and helped with the grant
25 application period. It was Arnie who spearheaded our
26 fundraising drive, who donated seed money to us, and
27 helped us create the Tinka Gordon memorial fund. . . in
28 memory of his wife to support our work. And it is Arnie
who works with me on a daily basis to recruit
volunteers, research the chemical makeup of cosmetic
products, and administer the organization.

. . .

And I want to be very, very clear: Arnie has done all
this, not to somehow mitigate the consequences of the
criminal charges brought against him . . . but out of

1 love and grief for his deceased wife, dedication to our
2 cause of eliminating breast cancer in the next
3 generation of women, and friendship to me and the many
4 others he knows who have been afflicted by this disease.
5 Because this is the kind of person Arnie is - caring,
6 dedicated to taking action to make the world a better
7 place, and a true friend to those in need.

8 From all that has been presented herein, we can discern a
9 clear pattern in Mr. Fischman's life. That pattern consists of
10 Mr. Fischman throwing himself into causes that help or promise to
11 help the human condition whenever he is able to do so. Observing
12 the plight of low-income people, particularly minorities and
13 people of color who lacked decent housing, he embarked on a
14 decades long struggle to remedy their plight, and in the course
15 became nationally known and respected in the field. In the course
16 of raising a son he learned of the needs of his son's school, an
17 important community resource, for additional space and financing.
18 Thereupon he devoted himself tirelessly to the arduous and
19 difficult process of planning the space and obtaining the means to
20 do the job. And faced with the unexpected and tragic death of his
21 wife (partner) in the throws of breast cancer treatment, he became
22 a tireless advocate and worker devoted to the cause of eliminating
23 that disease. That is the pattern of his life, not the deplorable
24 images and chats that gave rise to these criminal charges. In the
25 context of Mr. Fischman's life, this offense conduct is, without
26 question, an aberration. That is not to say it should go
27 unpunished; it is merely to recognize that it should not
28

1 extinguish or obscure the essential goodness of the man and the
2 value of what he has achieved.

3 **II. Determining an Appropriate Sentence for Mr. Fischman**

4
5 Having in mind the extraordinary personal characteristics and
6 accomplishments of Mr. Fischman, the Court must determine how
7 these qualities and accomplishments impact the sentencing decision
8 in this case. The touchstone of such analysis, of course, is found
9 in 18 U.S.C. § 3553, which provides that the Court should impose a
10 sentence which is "sufficient, but not greater than necessary, to
11 comply with the purposes set forth in paragraph (2) of this
12 subsection." Under this mandate, the Court must consider the
13 nature and circumstances of the offense and the history and
14 characteristics of the defendant. The cited factors in paragraph 2
15 include (1) the need for the sentence to reflect the seriousness
16 of the offense, to promote respect for the law, and to provide
17 just punishment;(2) to afford adequate deterrence to criminal
18 conduct; (3) to protect the public from further crimes by the
19 defendant; and (4) to provide the defendant with needed
20 educational or vocational training or medical care. The Court
21 should consider the kinds of sentences available, and the
22 sentencing range established by the Sentencing Guidelines. We
23 examine first the last of these, pointing out basis defects in the
24 child pornography guidelines that undermine their validity as a
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27
28

1 sentencing tool. We then examine the other factors more helpful
2 in determining the sentence.

3 **A. The Child Pornography Sentencing Guidelines Are Deeply**
4 **Flawed and Can Be Rejected by the Court**

5 In *Kimbrough v. United States*, 552 U.S. 82, 101 (2007), the
6 Supreme Court upheld the District Court's discretion to vary from
7 an otherwise correctly calculated Guidelines range "based solely
8 on policy considerations, including disagreements with the
9 Guidelines." *Id.* In *Kimbrough*, which dealt with the crack versus
10 powder cocaine discrepancy, the Court recognized the distortions
11 posed by Guidelines that were not developed by the U.S. Sentencing
12 Commission from "empirical data and national experience, guided by
13 a professional staff with appropriate expertise," but were rather
14 based upon Congressional mandates, like the mandatory minimum
15 sentences for crack cocaine cases, that did "not exemplify the
16 Commission's exercise of its characteristic institutional role."
17 *Id.* at 109. In such cases, sentencing courts may conclude that the
18 Guideline "yields a sentence 'greater than necessary' to achieve §
19 3553(a)'s purposes even in a mine-run case." *Id.* at 110.

23 Following *Kimbrough*, numerous courts, including the Ninth
24 Circuit, have applied this same analysis to the child pornography
25 Guideline, holding that "a district court commits procedural error
26 when it fails to appreciate its *Kimbrough* discretion to vary from
27 the child pornography Guidelines based on a categorical
28 disagreement with them." *United States v. Henderson*, 649 F.3d 955,

1 964 (9th Cir. 2011)(citing *United States v. Tutty*, 612 F.3d 128,
2 131 (2d Cir. 2010); *United States v. Stone*, 575 F.3d 83, 89 (1st
3 Cir. 2009)). In doing so, the Ninth Circuit in *Henderson*
4 extensively reviewed the "anomalous history" of the child
5 pornography Guideline. *Id.* at 960-62; see also *id.* at 964-65
6 (Berzon, J., concurring). This anomaly resulted from the fact
7 that the numerous sharp Guideline increases since the Guidelines
8 initial adoption were driven by arbitrary congressional mandates,
9 rather than reasoned deliberations of the Commission and its
10 staff.
11

12
13 Specifically, *Henderson* begins by noting that, "[m]uch like
14 policymaking in the area of drug trafficking, Congress has used a
15 mix of mandatory minimum penalty increases and directives to [the
16 U.S. Sentencing] Commission to change sentencing policy for sex
17 offenses." *Id.* at 960 (citation and internal quotation marks
18 omitted). The Ninth Circuit then traces the development of the
19 child pornography guideline, U.S.S.G. § 2G2.2:
20

21 • At the inception of the Guidelines in **1987**, simple
22 possession of child pornography was not a crime and the
23 relevant Guideline, § 2G2.2, was limited to "transporting,
24 receiving, or trafficking" offenses. *Id.* The base offense
level for these crimes was 13. *Id.*

25 • The crimes of possession and possession with intent
26 to sell were added in **1990**. *Id.* (citation omitted).
27 The Commission responded by adding a new Guideline at §
28 2G2.4 to address receipt or possession of child
pornography, while trafficking continued to be covered
by § 2G2.2. *Id.* (citation omitted). The base offense
level for trafficking offenses was to be increased
by two levels if the material involved a prepubescent

1 minor or a minor under the age of twelve years, and by
2 four levels if the material portrayed sadistic or
3 masochistic conduct. *Id.* (citation omitted). The base
4 offense level for possession was 10 and there was a
5 two-level enhancement if the material involved a
6 prepubescent minor. *Id.*

7 • In **1991**, "over the objection of the Commission,"
8 Congress directed the Commission to increase penalties
9 for child pornography offenses. *Id.* at 960-61 (citation
10 omitted). In addition to changes to the trafficking
11 guideline, the base offense level for possession was
12 increased to 13 and an enhancement was added for the
13 number of items possessed. *Id.* at 961.

14 • In 1995, Congress again directed the Commission to
15 increase penalties for child pornography crimes by
16 increasing the base offense levels by two and adding a
17 two-level enhancement for use of a computer. *Id.* These
18 amendments were adopted in **1996**. *Id.* However, in a
19 report to Congress that same year, the Commission
20 "criticized the two-level computer enhancement because
21 it failed to distinguish serious commercial
22 distributors from more run-of-the-mill users." *Id.*
23 In **2000**, further amendments enhancing the
24 trafficking guideline were adopted in response to
25 the "1998 Sexual Predators Act." *Id.*

26 • In **2003**, Congress enacted the Prosecution Remedies
27 and Other Tools to End the Exploitation of Children
28 Today Act (the "PROTECT Act"), which established a
mandatory minimum sentence for trafficking and
increased the statutory maximum sentences for both
trafficking and possession offenses. *Id.* at 962
(citation omitted). "In the PROTECT Act, Congress-for
the first time and the only time to date-made direct
amendments to the Guidelines." *Id.* (citation omitted).
Congress added to the possession guideline an
enhancement of four levels for images of sadistic or
masochistic conduct, and for all offenses increased to
up to five levels the enhancement for the number of
images. *Id.*

• Finally, to conform to the new mandatory minimum and
higher statutory maximums imposed by the PROTECT Act,
the Commission in **2004** raised the child pornography
based offense levels across the board, including
raising the base offense level for possession from 15

1 to 18. *Id.* "In sum, the child pornography Guidelines
 2 have been substantively revised nine times during their
 3 23 years of existence. Most of the revisions were
 4 congressionally-mandated and not the result of an
 empirical study." *Id.*¹ As explained by the Commission
 itself, this has made it "difficult to gauge the

5
 6 ¹ Even more problematically, these revisions were "the result of
 7 arbitrary increases by Congress slipped into other bills, often
 8 with little or no rebate, resulting in direct amendments to the
 guidelines." *United States v. Hanson*, 561 F. Supp.2d 1004, 1009
 (E.D. Wis. 2008) (citation omitted).

9
 10 The reasons for the judiciary's treatment and skepticism towards
 the child pornography guidelines is clear. The guidelines for
 11 child pornography offenses have increased dramatically over the
 years. In nearly every instance, these increases were mandated by
 12 Congress, often over the objection of the Sentencing Commission.
See Henderson, 649 F.3d at 960-62. When possession of child
 13 pornography was criminalized in 1990, the Sentencing Commission
 14 created a new guideline for that offense, with a base offense
 level of 10 and a 2-level enhancement for material involving a
 15 prepubescent minor. *Id.* (citations omitted). Congress, however,
 was not satisfied, and in 1991, "over the objection of the
 16 Commission," Congress directed the Commission to increase
 penalties for child pornography offenses. *Id.* at 960. Among other
 17 changes, Congress "explicitly ordered the Commission" to increase
 the base offense levels to 15 (for receipt, transportation, and
 18 trafficking) and 13 (for possession). *Id.* at 960-61. Congress
 19 demanded further increases in 1995, increasing the base offense
 level by 2 levels and adding a 2-level enhancement for use of a
 20 computer. *Id.* When the Commission submitted a report to Congress
 21 that was critical of the Congressionally mandated two-level
 computer enhancement because "it failed to distinguish serious
 22 commercial distributors from more run-of-the-mill users," Congress
 23 "responded with legislation that directed the Commission to add
 enhancements for the use of a computer to persuade, induce,
 24 entice, coerce or facilitate the transport of a child; to increase
 penalties in any case in which the defendant engaged in a pattern
 25 of activity; and to clarify that distribution included
 distribution for nonpecuniary gain." *Id.* at 961 (citations
 26 omitted). With the enactment of the 2003 PROTECT Act, "Congress -
 27 for the first time and the only time to date - made direct
 amendments to the Guidelines." *Id.* (citation omitted). These
 28 amendments included an enhancement for images of sadistic or
 masochistic conduct and a range of enhancements based upon the
 number of images. *Id.*

1 effectiveness of any particular policy change, or to
2 disentangle the influences of the Commission from
3 those of Congress.'" *Id.* (citation omitted).

4 Accordingly, the Ninth Circuit in *Henderson* held that,
5 "similar to the crack cocaine Guidelines, districts courts may
6 vary from child pornography guidelines, § 2G2.2, based on policy
7 disagreement with them, and not simply based on an individualized
8 determination that they yield an excessive sentence in a
9 particular case." *Id.* at 963 (citations and footnote omitted).
10

11 As Judge Berzon noted in her forceful concurrence, "an unduly
12 deferential application of § 2G2.2 will lead to the vast majority
13 of offenders being sentence to near the statutory maximum term,"
14 which "stands in significant tension with a sentencing judge's
15 duties 'to consider every convicted person as an individual.'" *Id.*
16 at 965 (quoting *Gall*, 552 U.S. at 52). Second, it notes as an
17 "illogical" result that "§ 2G2.2 often recommends longer sentences
18 for those who receive or distribute images of minors than the
19 applicable Guidelines recommend for those who actually engage in
20 sexual conduct with minors." *Id.* (citing *Dorvee*). Finally, it
21 suggests that "[d]istrict judges who, after having considered §
22 2G2.2, conclude that it constitutes bad advice should be
23 encouraged to reject it as such." *Id.* at 966 (citing *Kimbrough*).
24 Along these lines, the Court may find that an analysis of the
25 effect of § 2G2.2 on Mr. Fischman's case demonstrates why the
26 Court can reject the guidelines here, even, as a starting point
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28

1 for this sentencing computation. Indeed, a district court
2 "commits procedural error when it fails to appreciate its
3 *Kimbrough* discretion to vary from the child pornography Guidelines
4 based on a categorical disagreement with them," *Id.* at 964.
5

6 In finding as it did, the Ninth Circuit joined numerous other
7 courts that reached this same conclusion. *See, e.g., United States*
8 *v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010) (holding that § 2G2.2
9 is "fundamentally different" from other Guidelines and that,
10 unless it is "applied with great care, it can lead to unreasonable
11 sentences that are inconsistent with what § 3553 requires"); *See*
12 also *United States v. Grober*, 624 F.3d 592, 608-09 (3d Cir. 2010)
13 (holding that § 2G2.2 was not developed pursuant to the
14 Commission's characteristic institutional role and that district
15 courts may vary on a policy basis from it); *United States v.*
16 *Tutty*, 612 F.3d 128, 131 (2d Cir. 2010); *United States v. Stone*,
17 575 F.3d 83, 90 (1st Cir. 2009); *United States v. Brasfield*, 2011
18 WL 3844181 (E.D. Wis. Aug. 29, 2011) at *3 (holding that § 2G2.2
19 is "a seriously flawed provision worthy of little deference");
20 *United States v. Ontiveros*, 2008 WL 2937539 at *8 (E.D. Wis.
21 2008); *United States v. Baird*, 580 F. Supp.2d 889, 895 (D. Neb.
22 2008).
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26 In sum, the child pornography guidelines have been
27 substantively revised nine times during their 23 years of
28 existence. Most of the revisions were Congressionally mandated and

1 were not the result of an empirical study. As the Commission
2 itself has explained, "The frequent mandatory minimum legislation
3 and specific directives to the Commission to amend the
4 [G]uidelines make it difficult to gauge the effectiveness of any
5 particular policy change, or to disentangle the influences of the
6 Commission from those of Congress." *Id.* (citation omitted).² The
7 changes to § 2G2.2 recounted in *Henderson* dramatically increase
8 Mr. Fischman's sentencing range under the Guidelines.³ As
9 indicated in the table below, had Mr. Fischman been sentenced for
10 the same conduct when the Guidelines first were adopted for
11 possession charges in 1990, his Guideline range, with the
12 adjustment for acceptance of responsibility, would have been 6-12
13 months in Zone B, authorizing a sentence of probation with a
14 condition of home confinement. See U.S.S.G. § 5C1.1(c)(3).
15 Nevertheless, Mr. Fischman's sentencing range for the same conduct
16 under the current Guidelines, even with his acceptance of
17 responsibility and a record of no prior criminal convictions of
18 any kind, pushes up against & exceeds the 10 year statutory
19 maximum for the offense of conviction.
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26 ² Not only were these revisions mandated without regard for the
27 Commission's input, but many were "the result of arbitrary
28 increases by Congress slipped into other bills, often with little
or no debate." *United States v. Hanson*, 561 F. Supp. 2d 1004,
1009 (E.D. Wis. 2008).

³ In 1997, child pornography offenders received a mean sentence of
20.59 months. *Stabenow Report*.

Sentencing Ranges under Various Iterations of the Guidelines, 1987 to the Present⁴

	1987	1990	1991	1996	2000	2003	since 2004
base offense	-	10	13	15	15	15	18
victim under 12	-	+2	+2	+2	+2	+2	+2
# of images	-	-	+2	+2	+2	+5	+5
computer use	-	-	-	+2	+2	+2	+2
sadism/masochism	-	-	-	-	-	+4	+4
acceptance	-	-2	-3	-3	-3	-3	-3
Distribution ⁵	-				+2	+2	+2
Guideline range	-	6-12	15-21	27-33	27-33	70-87	97-121
(Criminal History I)							

As cautioned in *Henderson*, deference to the calculation of the sentencing range under the current Guidelines is in tension with the Court's duty to consider every convicted person as an individual, since each of these enhancements that apply to Mr. Fischman's also apply to virtually every defendant against whom these charges are filed. See *Henderson*, 649 F.3d at 965 (Berzon, J., concurring). Along these lines, one district court has explained:

⁴ These computations are based on the chronology in *Henderson* and the summary table of child-pornography Guidelines changes that is attached to the Stabenow report.

⁵ These calculations are presented to the Court without a comprehensive analysis of the increase under Distribution Offense Characteristics which contains its own convoluted and tangled history of Congressional interference with the role of the Sentencing Commission.

[T]he enhancements for use of a computer and images containing children under age twelve are typical of this crime. Further, given the unfortunate ease of access to this type of material in the computer age, compiling a collection with hundreds of images is all too easy, yet carries a 5 level enhancement, which in this case nearly doubled the range. . . . The other large enhancement defendant received—4 levels for portrayal of sadistic conduct—applies whether or not the person specifically intended to possess such material, see U.S.S.G. § 2G2.2 cmt. n.2, which seems an odd way of measuring culpability.

Hanson, 561 F. Supp. 2d at 1009. According to the U.S. Sentencing Commission's fiscal year 2010 figures,⁶ the percentage of child pornography defendants who received the exact same enhancements as Mr. Fischman's receives are as follows:

§ 2G2.2(b)(2) victim under the age of 12 years (2 levels): 95.6% of defendants

§ 2G2.2(b)(4) sadistic/masochistic or other violence (4 levels): 73.6% of defendants

§ 2G2.2(b)(6) use of a computer (2 levels): 96.2% of defendants

§ 2G2.2(b)(7)(D) 600 images or more (5 levels): 66.9% of defendants

As these statistics demonstrate, the child pornography Guideline fails to distinguish the most serious from the least serious offenders because nearly all defendants are routinely

⁶ *Use of Guidelines and Specific Offense Characteristics for Fiscal Year 2010*, available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2010/10_glinexgline.pdf, at 37-39, cited in *Henderson*, 649 F.3d at 965 (Berzon, J., concurring).

1 subject to every enhancement, rendering them effectively
2 meaningless.⁷

3 The escalating guideline ranges in child pornography cases
4 have caused "widespread dissatisfaction" among district court
5 judges. *United States v. Apodaca*, 641 F.3d 1077, 1083 (9th Cir.
6 2011) (citing U.S.S.C., *Results of Survey of United States*
7 *District Judges January 2010 through March 2010* (2010) ("Judicial
8 Survey"), available at <http://www.ussc.gov/sites/default/files>
9 [/pdf/research-andpublications/research-projects-and-surveys/](http://www.ussc.gov/sites/default/files/pdf/research-andpublications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf)
10 [surveys/20100608_Judge_Survey.pdf](http://www.ussc.gov/sites/default/files/pdf/research-andpublications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf).) For example, 71% of the
11 federal judges surveyed in 2010 believed that the mandatory
12 minimum sentence for receipt of child pornography was too high,
13 and 70% believed that the guidelines for possession of child
14 pornography offenses were too high. See Judicial Survey, *supra*.
15 The judiciary's discomfort with the child pornography guidelines
16 is reflected in the sentences imposed. In fiscal year 2015,
17 approximately 28% of the sentences imposed nationwide were within
18 the advisory § 2G2.2 guideline range. See U.S.S.C, 2014 Sourcebook
19 of Federal Sentencing Statistics (2015) at Table 28, available at
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26 ⁷ This illogical result was predicted by the Commission in 2004.
27 See *Hanson*, 561 F. Supp. 2d at 1010 ("As noted by the Guidelines
28 Commission, there are 'several specific offense characteristics
which are expected to apply in almost every case (e.g., use of a
computer, material involving children under 12 years of age,
number of images).") (quoting Amendment 664 to United States
Sentencing Guidelines (Nov. 1, 2004)).

1 <http://www.ussc.gov/sites/default/files/pdf/research-and->
2 [publications/annual-reports-andsourcebooks/2014/Table28.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-andsourcebooks/2014/Table28.pdf).

3 Conversely, 70% of sentences imposed were below the guidelines.
4
5 *Id.*

6 In light of these numerous deficiencies, Judge Jack Weinstein
7 of the Eastern District of New York eloquently explains why the
8 child pornography guidelines are so offensive to our system of
9 justice:

10
11 Prosecution under the current sentencing framework has
12 largely failed to distinguish among child pornography
13 offenders with differing levels of culpability and
14 danger to the community. The applicable structure does
15 not adequately balance the need to protect the public,
16 and juveniles in particular, against the need to avoid
17 excessive punishment, with resulting unnecessary cost to
18 defendants' families and the community, and the needless
19 destruction of defendants' lives. One of the
20 Foundational rules of our criminal justice system is
21 that punishment should be commensurate with the crime-
22 its threat to society. The need to tailor sentences to
23 the dangers and needs of the individual being sentenced
24 (and his family and community) are also foundational.
25 Proportionality in sentencing encourages a fair system.
26 Increasingly, judges, prosecutors, advocates and
27 concerned citizens have recognized that the current
28 sentencing approach to child pornography offenders is
often unfair, unreasonable, cruel, and conceptually
deficient.

23 R.V., 2016 WL 270257, at *1-2.

24 For these reasons, Courts in this District have understood
25 and followed the reasoning of *Henderson* in varying substantially
26 below the sentencing guidelines. If the Court wishes, we can cite
27 to and describe these cases in detail but are hesitant to do so
28 now because of space limitations. Suffice to say Courts in the

1 District, as elsewhere, have recognized the profound deficiencies
2 in these particular Guidelines we have discussed herein.

3 **B. The Relevant Sentencing Factors in § 3553 Militate in**
4 **Favor of a Sentence Well Below the Sentencing Guidelines**
5 **and Lower than that Recommended by the United States**
6 **Probation Office**

7 As we said at the outset, the offense is a serious one and it
8 is necessary that the sentence imposed by the Court take this into
9 account. The history and characteristics of the defendant,
10 however, weigh heavily in his favor. In the first section of this
11 memorandum we have set forth in detail Mr. Fischman's devotion to
12 the causes of affordable housing and eradication of breast cancer
13 as well as his commitment to his family and community. He is
14 clearly a person with a profound sense of responsibility and
15 integrity. His word is trusted. He is esteemed by those who have
16 known him for decades as well as by more recent acquaintances.
17 Given the letters submitted to this Court and Dr. Welch's
18 comprehensive report, there is little reason to believe that the
19 defendant will commit further crimes or that he must be deterred
20 from doing so by a harsh sentence here. Additionally, there are
21 numerous factors, commonly cited as departures or variances from
22 the Sentencing Guidelines which argue against a long sentence for
23 Mr. Fischman.
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26

27 **1. Post-Offense Rehabilitation**

28 One such factor is post-offense rehabilitation, which is
abundantly clear in Mr. Fischman's case. As Dr. Welch's report

1 states, Mr. Fischman sought help from him almost immediately after
2 the search warrant that initiated this case was served at his
3 home. (Dr. Welch Report to be filed under seal as Exhibit C). Long
4 before any charges were brought against him, Mr. Fischman was
5 seeing Dr. Welch for intensive therapy three times per week.
6 According to Dr. Welch, Mr. Fischman has been consistently candid
7 and open about this offense, which has left him guilty and
8 mortified with a strong desire to succeed in understanding the
9 roots of his problem. Dr. Welch makes clear that Mr. Fischman has
10 made tremendous progress and continues to see the doctor for
11 therapy twice a week. He concludes that Mr. Fischman represents no
12 risk to others, either now or in the future, that he has no
13 predatory tendencies and that his therapy, which is ongoing, has
14 been successful. In addition, since the search warrant was
15 executed at his home, and following the death of his wife, Mr.
16 Fischman has immersed himself in the cause of breast cancer
17 awareness, with funding and treatment options. He was
18 instrumental in setting up BCOT, and without him Ms. Marshall
19 could not have gotten it off the ground. The Pre-Sentence Report
20 details the things Mr. Fischman has done post-offense (see para.
21 72) and makes reference to his ongoing treatment by Dr. Welch.

22 In *Pepper v. United States*, the Supreme Court emphasized that
23 evidence of post-sentencing rehabilitation may be highly relevant
24 to several of the § 3553(a) factors. Such evidence, the Court

1 said: may also be pertinent to "the need for the sentence imposed"
2 to serve the general purposes of sentencing set forth in §
3 3553(a)(2) - in particular, to "afford adequate deterrence to
4 criminal conduct," "protect the public from further crimes of the
5 defendant," and "provide the defendant with needed educational or
6 vocational training ... or other correctional treatment in the
7 most effective manner." §§ 3553(a)(2)(B)-(D); see *McMannus*, 496
8 F.3d, at 853 (Melloy, J., concurring) ("In assessing ...
9 deterrence, protection of the public, and rehabilitation, 18
10 U.S.C. § 3553(a)(2)(B)(C) & (D), there would seem to be no better
11 evidence than a defendant's post-incarceration conduct"). *Pepper*
12 *v. United States*, 131 S. Ct. 1229, 1242 (2011). Additionally, the
13 Court found that "post-sentencing rehabilitation may also
14 critically inform a sentencing judge's overarching duty under §
15 3553(a) to 'impose a sentence sufficient, but not greater than
16 necessary' to comply with the sentencing purposes set forth in §
17 3553(a)(2)." *Id.*

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21 Equally significant for Mr. Fischman's case, the Court
22 indicated that:

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24 Post sentencing conduct also sheds light on the
25 likelihood that he will engage in future criminal
26 conduct, a central factor that district courts must
27 assess when imposing sentence. See §§ 3553(a)(2)(B)-(C);
28 *Gall*, 552 U.S., at 59, 128 S.Ct. 586 ("Gall's self-
motivated rehabilitation ... lends strong support to the
conclusion that imprisonment was not necessary to deter
Gall from engaging in future criminal conduct or to
protect the public from his future criminal acts"
(citing §§ 3553(a)(2)(B)-(C)). Finally, *Pepper's*

1 exemplary post-sentencing conduct may be taken as the
2 most accurate indicator of "his present purposes and
3 tendencies and significantly to suggest the period of
4 restraint and the kind of discipline that ought to be
5 imposed upon him." *Ashe*, 302 U.S., at 55, 58 S.Ct. 59.
6 Accordingly, evidence of Pepper's post-sentencing
7 rehabilitation bears directly on the District Court's
8 overarching duty to "impose a sentence sufficient, but
9 not greater than necessary" to serve the purposes of
10 sentencing. § 3553(a).

11 *Id.* at 1242-43.

12 For precisely the same reasons, Mr. Fischman's self-
13 motivated, post-arrest rehabilitation "lends strong support to the
14 conclusion that imprisonment is not necessary to deter him from
15 engaging in future criminal conduct, or to protect the public from
16 his future criminal acts." It may also be taken as "the most
17 accurate indicator of his present purposes and tendencies and
18 significantly to suggest the period of restraint and the kind of
19 discipline that ought to be imposed upon him." Mr. Fischman has
20 clearly demonstrated that he is truly repentant and has achieved
21 real gains in rehabilitating himself and changing his behavior. He
22 has also shown that this offense represents a marked deviation
23 from an otherwise law-abiding life.

24 **2. Aberrant Behavior**

25 Additionally, Mr. Fischman's offense conduct was aberrant
26 behavior in the context of his life. Even though the conduct went
27 on for a considerable period of time, it was aberrant in the sense
28 that it was completely different from everything else he did in
his personal and professional life. That is why everyone who

1 communicated with the Court expressed sincere shock and surprise
2 at discovering this flawed behavior in someone they knew and
3 trusted. The discovery did not undermine their trust because they
4 were confident in the Arnold Fischman they had come to know as a
5 caring, kind and compassionate person, devoted to improving the
6 human condition whenever able to do so. In other words, the arc
7 of Mr. Fischman's life demonstrates that there is "little
8 likelihood that the defendant will commit other crimes." USSG §
9 4A1.3(b)(1). This factor has been held to support a downward
10 variance. See *United States v. Pauley*, 511 F.3d 468 (4th Cir.
11 2007)(re-offense unlikely); *United States v. Stall*, 81 F.3d 276,
12 279 (6th Cir. 2009).

15 3. Difficult Childhood/Lack of Youthful Guidance

16 The Ninth Circuit has determined that extraordinary childhood
17 abuse and lack of guidance as a youth may be mitigating factors
18 which render a defendant less culpable. See, e.g. *United States v.*
19 *Floyd*, 945 F.2d 1096 (9th Cir. 1991); *United States v. Walter*, 256
20 F.3d 891 (9th Cir. 2001).

21 The Pre-Sentence Report (see Justification, p. 40 and para's
22 61-67), and Dr. Welch's comprehensive report detail the abnormal
23 and harmful conditions during Mr. Fischman's childhood. The
24 Probation Officers identified these conditions as a factor that
25 may in the officer's view warrant a lower sentence. (PSR, para.
26 129).

4. Community Service and Employment History

We have detailed Mr. Fischman's positive contributions to the community. The Probation Officer, in the Justification portion of the sentencing recommendation states that, in addition to Arnie's dysfunctional childhood and lack of criminal history, his "community service, and employment history with non-profit affordable housing agencies are factors that warrant a sentence below the Guideline range." (PSR, p. 41). We respectfully agree with this assessment. Mr. Fischman has been singularly unselfish and even altruistic throughout his professional life. Countless families live in decent, dignified housing because of him. It is entirely appropriate for the Court to take this into consideration in considering the sentence to be imposed on Mr. Fischman.

III. The Pre-Sentence Report

Throughout this memorandum we have discussed various aspects of the pre-sentence report. We appreciate the conscientious work of the Probation Officer in compiling this report and accurately detailing important aspects of Mr. Fischman's life and work. Our comments on the report are few and not of great moment. In paragraph 118 and in the ultimate recommendation, it is recommended that Mr. Fischman pay an additional special assessment of \$5,000 pursuant to 18 U.S.C. § 3104. That Section was enacted on May 29, 2015, and constitutes punishment (see Section 2015) and thus constitutes an *ex post facto* law if applied to the defendant.

1 Thus, he was not arraigned on this matter nor was it included in
2 the plea agreement. We submit, and we believe the government
3 agrees, that the provision does not apply to this defendant.
4

5 In paragraph 74 it was reported that Mr. Fischman hoped to
6 attend his great-nephew's Bar Mitzvah in New York City in January
7 2017. As it transpired, the government voiced an objection to
8 this travel so he did not go.

9 **IV. The Court's Sentencing Discretion Should Reflect Mr.**
10 **Fischman's Enormous and Ongoing Contributions to the Public**
11 **Good, the Integrity and Compassion with Which He Has Lived**
12 **His Life, and His Significant Post-Offense Rehabilitation**

13 We have set forth in detail Mr. Fischman's contributions and
14 the esteem in which he is held by those who know him best and
15 these factors should bear considerable weight in the sentencing
16 determination. Of course it must also reflect the seriousness of
17 the offense conduct herein, recognizing that child pornography has
18 victims and that a defendant should be held accountable for such
19 offenses. Here, Mr. Fischman has come to terms with the negative
20 aspects of his conduct, has sought and engaged in intensive
21 therapy to provide insight into the underlying causes of his
22 offense conduct, and has in other ways demonstrated sincere
23 remorse and regret. His statement, quoted in the Pre-Sentence
24 Report, is thoughtful and accepts full responsibility for the
25 offense conduct. On the other hand, those who rely on his
26 guidance, compassion and expertise are very concerned at the
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28

1 prospect of his departure from their lives from any appreciable
2 period of time.

3 Without in any way denigrating the seriousness of the
4 offense, we believe that a sentence well below the Guideline and
5 below even the five years proposed by the Probation Officer is
6 appropriate in this unique case. Without presuming to intrude upon
7 the Court's distortion in this regard, we trust in the Court's
8 wisdom in structuring an appropriate sentence in Mr. Fischman's
9 case. Whatever that sentence may be, Mr. Fischman fully accepts
10 it and reaffirms his acceptance of responsibility in this case.
11 There is little doubt that through the remainder of his life he
12 will continue along the positive path he has charted for nearly
13 seven decades and he will certainly not reoffend.
14
15

16 With respect to restitution, we agree that restitution is
17 appropriate for the victim who has appeared through counsel. The
18 parties are in agreement that a \$5,000 restitution order is
19 appropriate.
20

21 CONCLUSION

22 Mr. Fischman's case reminds us once again of the complexity
23 of the human mind, such that the perverse thoughts and actions
24 present in this offense conduct can coexist, even in small part,
25 with a long life characterized by kindness, compassion, public
26 service, and integrity. It is not easy to plumb such mysteries
27 and it is of great importance that Mr. Fischman himself has
28

1 undertaken a long course of intense self-examination and treatment
2 under the guidance of a highly qualified professional. Mr.
3 Fischman has assured the Court that he will never reoffend and Dr.
4 Welch fully supports that commitment. We respectfully ask that
5 the Court, upon due consideration, impose a sentence that fully
6 reflects these qualities and that commitment.
7

8 Dated: February 7, 2017 Respectfully submitted,
9

10
11 /s/ William L. Osterhoudt
12 WILLIAM L. OSTERHOUDT

13 /s/ Gail Shifman
14 GAIL SHIFMAN

15 Attorneys for ARNOLD FISCHMAN
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